United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

76-1401

To be argued by
EDWARD J. LEVITT

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1401

UNITED STATES OF AMERICA,
Appellee,

—v.—

ERIC STANCHICH,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Eric Stanchich appeals from a judgment of conviction entered on September 7, 1976, in the United States District Court for the Southern District of New York, after a three-day trial before the Honorable Lawrence W. Pierce, United States District Judge, and a jury.

Indictment 75 Cr. 1162, in three counts, was filed on December 2, 1975. Count One charged Stanchich and Alan Michael Fitzgerald, with having conspired to possess, pass, attempt to sell, transfer and deliver counterfeit United States Treasury Bills in $100,000 denomination, in violation of Title 18, United States Code, Section 371. Count Two charged Stanchich and Fitzgerald with having possessed, passed and attempted to sell one coun-

terfeit treasury bill, in violation of Title 18, United States Code, Sections 472 and 2. Count Three charged Stanchich and Fitzgerald with transferring and delivering one counterfeit treasury bill, in violation of Title 18, United States Code, Sections 473 and 2.

Trial began on June 29, 1976 and ended on July 1, 1976, when the jury convicted Stanchich and Fitzgerald on Counts Two and Three.*

On September 7, 1976, Judge Pierce sentenced both Stanchich and Fitzgerald to concurrent terms of three years' imprisonment on Counts Two and Three.

Stanchich is at liberty pending appeal.

Statement of Facts

A. The Government's Case

1. Synopsis

The Government's proof established that Stanchich and Fitzgerald engaged in a scheme to sell counterfeit treasury bills in $100,000 denominations. The evidence showed that Stanchich was the supplier of the counterfeits whose function in the scheme, to a large extent, allowed him to remain in the background. Fitzgerald negotiated the sale of the counterfeits as the middle-man between Stanchich and an undercover agent posing as a corrupt banker.

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* At the conclusion of the Government's case, on motion of defendants, the Court directed a verdict of acquittal as to Count One, the conspiracy count.

2. The pre-October 1975 background *

In August 1974, Alan Lurie, who was seeking to raise money for a magazine publisher that employed him, spoke to the defendant Stanchich in an attempt to enlist Stanchich's aid. Stanchich offered Lurie counterfeit treasury bills to use as collateral to obtain the needed financing, but Lurie refused the offer. (Tr. 15-20).**

In March 1975, Robert Della Porta and an associate attempted to pass Lurie counterfeit treasury bills without advising Lurie that they were counterfeit. Lurie was aware that Stanchich and Della Porta knew each other, and, in the beginning of April 1975, Lurie asked Stanchich if he was aware of Della Porta's attempt to pass the counterfeits. Stanchich replied that he knew all about it, because Della Porta had told him, and Stanchich added that Della Porta should not have done that to Lurie. (Tr. 28-31).

3. The scheme begins in October 1975

In the evening of Tuesday, October 28, 1975, after Lurie had begun to cooperate with the Government, Lurie placed a tel phone call, at the instruction of the Secret Service, to Stanchich's home. When no one answered, Lurie called Fitzgerald and tape-recorded a telephone conversation in which Lurie told Fitzgerald that he had a "home" with a banker friend for the things which Stanchich's friend Della Porta had previously discussed with Lurie. Lurie said he was talking about "very large

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* The evidence of the events set forth in this portion of the Statement of Facts was introduced as proof of prior similar acts by Stanchich.

** "Tr." refers to the trial transcript; "GX" refers to Government exhibit; "Br." refers to Stanchich's brief.

numbers" and asked Fitzgerald to arrange a meeting with Stanchich to discuss the matter. Fitzgerald advised that Stanchich was in Europe but that Fitzgerald would call Lurie the following day. (Tr. 31-40; GX 1).*

Two days later, on October 30, 1975, Stanchich returned to the United States (Tr. 311), and on November 3, 1975, Fitzgerald telephoned Lurie. Fitzgerald claimed that he had not yet spoken to Stanchich, but had spoken to his people who told him a sample counterfeit bill was available. Lurie arranged to meet Fitzgerald the following morning in Manhattan. (Tr. 49-50).

On November 4, 1975, Lurie met Fitzgerald in a Manhattan coffee shop. Fitzgerald showed Lurie a counterfeit $100,000 treasury bill, and Lurie asked if he could take the bill with him for several hours to show it to "his banker." Fitzgerald replied that before releasing the bill, he would have to obtain permission from "his people." Fitzgerald told Lurie he would meet him in Lurie's office two hours later to turn over the sample bill.

Later that morning, as scheduled, Fitzgerald came to Lurie's office, gave Lurie the counterfeit treasury bill ("the November 4 bill"), and told Lurie that "his people" wanted 20% of face value for the bill. Lurie indicated that that price would probably be acceptable. Fitzgerald then told Lurie that he would be back at approximately 2:00 p.m. to pick up the treasury bill. (Tr. 50-54).

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* The tape-recording was admitted into evidence solely as against Fitzgerald. (Tr. 31). With regard to Fitzgerald's statement therein that Stanchich was in Europe, which Stanchich refers to in passing (Br. at 6), that statement in no way prejudiced Stanchich and any claim of prejudice was rendered moot by Stanchich's stipulation that he was out of the country at the time of the conversation. (Tr. 311).

Immediately after Fitzgerald left, Lurie telephoned Secret Service Agent Robert Hast, who picked up the treasury bill and returned with it to the Secret Service office where it was photographed. (Tr. 54-55, 223-26, 246; GX 5). Later that afternoon, Lurie spoke to Fitzgerald on the telephone and advised Fitzgerald that his banker was still examining the counterfeit bill. Lurie and Fitzgerald then agreed to meet at 6:00 p.m. at the Cattleman's Restaurant, New York, N.Y., at which time Lurie said he would either return the bill or pay Fitzgerald the $20,000. (Tr. 55-56).

Lurie then went to the Secret Service office where he was introduced to Special Agent Francis McDonnell who was to pose as a corrupt banker interested in obtaining counterfeits.* At that time, Agent Hast showed McDonnell the counterfeit treasury bill, and McDonnell and Hast pointed out to Lurie that the word "payable" was misspelled on the face of the bill. (Tr. 123-26, 227-29, 284).

At 6:00 p.m. Lurie met with Fitzgerald at the Cattleman's Restaurant and introduced Agent McDonnell as a banker. McDonnell then pointed out to Fitzgerald that the word "payable" was misspelled on the treasury bill.** Fitzgerald remarked that in all his years of dealing in counterfeit he had never seen a misspelling. He said that he would see his people and arrange for the corrections to be made within one week.

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* Posing as a corrupt banker, McDonnell had originally been introduced to Lurie in August 1974. In September 1974, Lurie had introduced McDonnell to Stanchich. (Tr. 58, 155-57).

** Contrary to assertions of counsel (Br. at 6), the bill McDonnell returned to Fitzgerald was the same bill Fitzgerald had previously given to Lurie. (Tr. 54-55, 125-26, 229).

McDonnell then told Fitzgerald that he wished to deal in approximately $3,000,000 worth of counterfeits, and Fitzgerald replied that the price would be 25% of face value with at least 10% of face value to be paid upon delivery. McDonnell advised Fitzgerald that the bills would be used as collateral for a loan in the name of an old corporate client of the bank at which McDonnell worked and that the counterfeits would ultimately be switched with genuine Treasury Bills which were in an estate trust account at the bank. McDonnell explained that, if delivery of the bills were made in the vicinity of his bank by 11:00 a.m. in the morning a large portion of the payment could be made from the loan account. Fitzgerald agreed to speak with his people and arrange to close the deal within one week. (Tr. 57-62, 71-72, 127-33, 229-33, 284).

In the morning of November 10, 1975, Fitzgerald went to Lurie's office. There, Fitzgerald informed Lurie that the corrections had been made on the counterfeit treasury bills and that he had a sample corrected bill. Fitzgerald added that his people had gone to a lot of trouble and expense in printing all $3,000,000 worth of the corrected bills and therefore wanted $20,000 to $25,000 immediately. Lurie said that he thought this could be arranged, and Fitzgerald gave Lurie a sample of the corrected counterfeit bills. Lurie told Fitzgerald he would show the bill to the banker, and the two men agreed to meet with McDonnell that afternoon at the Cattleman's Restaurant. (Tr. 72-74). After Fitzgerald left Lurie's office, Lurie called Special Agent James Gilmartin of the Secret Service and informed Gilmartin of what had occurred. At approximately 11:30 a.m. Agent Gilmartin came to Lurie's office, obtained the new counterfeit bill from Lurie and instructed Lurie not to attend the afternoon meeting. Shortly thereafter, Gilmartin met with

Agent McDonnell, advised McDonnell of what had occurred and gave McDonnell the November 10 bill. (Tr. 75-76, 134-36, 184-86, 284-86).

4. Stanchich's role in the scheme begins to emerge

In the afternoon of November 10, 1975, Agent McDonnell met with Fitzgerald in the Cattleman's Restaurant. There, McDonnell returned the new counterfeit bill which Fitzgerald acknowledged having given to Lurie. Fitzgerald was upset that Lurie was not present, and McDonnell told him that Lurie was at another business meeting. McDonnell informed Fitzgerald that he was employed at the Chase Manhattan Bank, 25 Broadway, New York, N. Y., as a vice-president and loan officer and gave Fitzgerald a telephone number at which he could be reached at the bank.

Fitzgerald told McDonnell that he had told Lurie that $25,000 had to be paid on this first bill before the balance of the $2.9 million in counterfeit could be delivered. Fitzgerald stated that he had promised his people he would receive the $25,000 that day. McDonnell told Fitzgerald that he did not wish to deal with only one bill at a time, since that might arouse suspicion at his bank, and that he wished to do the entire $3 million deal at one time. Fitzgerald agreed to speak to his people and attempt to convince them to do the entire deal at once. McDonnell and Fitzgerald then agreed to meet again at the same restaurant at 9:30 p.m., at which time Fitzgerald was to have an answer for McDonnell. (Tr. 133-34, 136-40, 187-88, 287).

Agent McDonnell met Fitzgerald later that night as scheduled. Fitzgerald was in the company of a woman,

who, Fitzgerald stated, was his wife. After a brief social conversation, the woman left the table. While the woman was absent, Fitzgerald told McDonnell that his people were upset that they had not received the first $25,000 and that they were wary of going through with the transaction. Fitzgerald said his cohorts wanted some assurance that they would be paid and asked McDonnell how payment would be arranged. McDonnell told Fitzgerald that two $100,000 payments would be made on the day that the counterfeits were delivered and that the balance would be available to Fitzgerald through the corporate loan account which they had previously discussed. At McDonnell's urging, Fitzgerald again stated that he would attempt to convince his people, who were dealing with the printer, to provide the entire package at one time, but that he was doubtful that he would succeed. At this point, the woman returned to the table, and Fitzgerald stated he would telephone McDonnell at 9:15 a.m. on November 12, 1975, to inform him of their decision. McDonnell then left the restaurant. (Tr. 140-45, 188-89, 233-34, 287-88).

As agent McDonnell walked out of the restaurant, 45th Street, on which the restaurant fronted, was almost deserted. As McDonnell walked east on the north side of the street, he was followed by Vincent Napoli.* When Napoli reached the intersection of 45th Street and Madison Avenue, he crossed over to the south side of 45th Street where he met with the defendant Stanchich. Napoli then crossed back to the north side of 45th Street and continued to follow McDonnell while Stanchich paralleled Napoli on the south side of 45th Street. When McDonnell reached the Grand Central Station area, he

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* Napoli was named as an unindicted co-conspirator in the Government's bill of particulars.

evaded Stanchich and Napoli. At this time, Stanchich and Napoli conversed briefly, looked up and down the intersecting street, Vanderbilt Avenue, and then proceeded east on 45th Street for a short distance after which they separated. Napoli walked north toward 46th Street, and Stanchich continued east on 45th Street. A short time later they again met on the southwest corner of 45th Street and Madison Avenue, in front of a Secret Service surveillance vehicle. (Tr. 145-47, 189-94, 288-91).

5. Stanchich's participation becomes clear and the sale is attempted

At 8:45 a.m. on Wednesday, November 12, 1975, just one-half hour before Fitzgerald was scheduled to call McDonnell, Stanchich, Fitzgerald and Napoli met and conferred for approximately one-half hour at the Market Diner, located in Manhattan on 11th Avenue between 43rd and 44th Streets.* At the end of this meeting, all three left the diner together. Stanchich and Napoli entered an automobile, while Fitzgerald went to a telephone booth located nearby from which he telephoned Agent McDonnell and informed McDonnell that he was having some difficulty. (Tr. 167-73, 194-95, 235-38, 255, 302-07; GX 7). McDonnell and Fitzgerald agreed to meet at 11:00 a.m. in the Compass Restaurant located at the intersection of Trinity Place and Morris Street in the Wall Street area of Manhattan. (Tr. 147).

Fitzgerald then entered the automobile which Stanchich was driving, and Stanchich, Fitzgerald and Napoli

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* Contrary to the assertion of counsel (Br. at 9), the record is void of any evidence tending to show that Stanchich, Fitzgerald or Napoli ate breakfast at the diner or that they met merely for the purpose of having breakfast together.

proceeded to a public garage located on Stone Street in the Wall Street area of Manhattan. (Tr. 173-76, 179-82, 195-99, 238-39, 244-45, 255; GX 6-A, 6-B, 7). At approximately 10:50 a.m., Agent McDonnell went to the Compass Restaurant where he met Fitzgerald in a booth in the restaurant. They conversed for approximately twenty minutes, while Stanchich and Napoli were seated just two booths away from McDonnell and Fitzgerald. (Tr. 176-77, 239-40, 255-59, 263, 291-93; GX 8).

Fitzgerald told Agent McDonnell that his cohorts were not happy with the arrangements. Fitzgerald said that his people wanted to use the first $25,000 to pay the printer and that, then, the balance of the $2.9 million in counterfeit treasury bills would be forthcoming the following day. McDonnell again said he did not want to handle only one bill at a time and again urged Fitzgerald to talk to his people. Fitzgerald agreed to try again and said he would speak to his people and call McDonnell at the bank by 12:15 p.m., that day.

McDonnell left the restaurant, walked east on Morris Street, and returned to the bank. (Tr. 147-50). Within minutes after McDonnell left the restaurant, Fitzgerald walked out of the restaurant and proceeded east on Morris Street behind McDonnell. Stanchich and Napoli immediately followed. (Tr. 245, 259-60, 293-94; GX 6-B, 8).

Thereafter, shortly before noon, Fitzgerald and Napoli were observed in the lobby of 2 Broadway, which is located just north of Stone Street in Manhattan, having a heated discussion.* A few minutes later, Stanchich

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* There is nothing in the record to support Stanchich's assertion (Br. at 10) that Stanchich and Napoli went directly from the Compass Restaurant to the lobby of 2 Broadway. The inference to be drawn from the evidence is that Stanchich, Napoli and Fitzgerald followed McDonnell to the bank and then proceeded to the lobby of 2 Broadway.

joined them. Shortly after noon, Stanchich and Napoli, without Fitzgerald, were observed in the lobby of 2 Broadway, arguing with each other. (Tr. 240-42, 260-62, 294-95; GX 6-B).

At approximately 12:15 p.m., Fitzgerald telephoned Agent McDonnell at the bank. In that conversation Fitzgerald told McDonnell that he could not deliver the entire $3,000,0000 package at one time but that he would deliver one counterfeit $100,000 treasury bill to McDonnell that day in return for the $25,000 which he would give his people. Fitzgerald stated that the remaining $2.9 million in counterfeit would be provided to McDonnell at another time. McDonnell and Fitzgerald argeed to meet at the Blarney Stone Bar, located on Trinity Place just north of the Compass Restaurant, at 2:00 p.m. that afternoon. (Tr. 150-51; GX 6-B).

Thereafter, between 12:15 and 1:30 p.m., Stanchich and Napoli strolled around the Wall Street area in conversation, with Fitzgerald walking nearby. (Tr. 242-43, 262-63, 295). At approximately 1:30 p.m., Stanchich returned to the entrance of the garage on Stone Street where he had parked the automobile, stood there smoking a cigarette, looked up and down the street several times, and then entered the garage. (Tr. 199-200). At approximately 1:50 p.m., Fitzgerald was observed walking up and down Trinity Place in front of the Blarney Stone Bar. (Tr. 295-96; GX 6-B). Ten minutes later, McDonnell met Fitzgerald in front of the Blarney Stone Bar. Fitzgerald took the envelope out of his jacket, gave it to McDonnell and told McDonnell that it contained one $100,000 treasury bill. McDonnell and Fitzgerald then entered the Blarney Stone Bar and sat down at a table where McDonnell opened the envelope which contained a counterfeit treasury bill (the "November 12 bill"). (Tr. 151-52, 158-59, 177-79, 296-97; GX 4).

After McDonnell opened the envelope, McDonnell told Fitzgerald that he had seen Stanchich at the Compass Restaurant at their meeting that morning and asked Fitzgerald if Stanchich was in on this deal. Fitzgerald told McDonnell not to ask questions about his end of the deal. McDonnell then stated that he had seen an unknown person with Stanchich that morning and asked if that man was in on the deal. Fitzgerald again told McDonnell not to ask questions about his end of the deal. McDonnell then suggested that, if Stanchich and the other person were in on the deal, Fitzgerald call them in so that McDonnell could talk to them and attempt to convince them to do the $3 million package at one time. Fitzgerald refused, telling McDonnell that he would get rid of them by the time McDonnell returned from the bank with the $25,000. McDonnell then gave a prearranged signal and Fitzgerald was arrested. (Tr. 152-55, 179).

Shortly after McDonnell and Fitzgerald entered the Blarney Stone Bar, Stanchich had driven the vehicle he had used earlier in the day out of the garage on Stone Street and began to circle the area in the car. At approximately 2:05 p.m., Special Agents of the Secret Service stopped Stanchich at the intersection of Broad and Pearl Streets and arrested him. (Tr. 200-01, 243-44, 263, 309-11).

A genuine $100,000 US Treasury Bill (GX 9) was used as the pattern bill for the printing of both the counterfeit November 4 and November 12 bills. (Tr. 311-14).

B. The Defendants' Case

The defendants presented no evidence.

ARGUMENT

POINT I

Fitzgerald's Statements Were Properly Admitted Against Stanchich. In Any Event, No Proper Objection Was Raised to Consideration of These Statements by The Jury and Any Error Was Harmless.

Stanchich argues that Judge Pierce erroneously permitted the jury to consider certain hearsay statements of Fitzgerald against him. In constructing this argument, Stanchich proceeds from two premises: first, that Fitzgerald made hearsay statements damaging to Stanchich and, second, that, in dismissing the conspiracy count of the indictment, Judge Pierce ruled that Stanchich's participation in the conspiracy had not been established by a fair preponderance of the non-hearsay evidence. (Br. 15). He argues from these premises, that once the conspiracy count had been dismissed, Judge Pierce should have foreclosed the jury's considerations of Fitzgerald's hearsay statements against Stanchich on the substantive counts as well. (Br. 15).

This argument is unpersuasive for a number of reasons. First, the premises underlying the claim are incorrect. The statements of which Stanchich complains were not hearsay. Moreover, Judge Pierce never made any finding that Stanchich's participation in the conspiracy had not been established by a fair preponderance of the non-hearsay evidence; indeed, the judge's only such finding was that the Government had introduced adequate non-hearsay evidence with respect to Stanchich's participation in the substantive offenses. (Tr. 342). Secondly, Judge Pierce's *Geaney** finding with respect to Stan-

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* *United States* v. *Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied sub nom. Lynch* v. *United States*, 397 U.S. 1028 (1970).

chich's involvement in the substantive offenses was fully supported by the record. Thirdly, even assuming the trial judge's *Geaney* finding were incorrect and hearsay statements by Fitzgerald were improperly admitted, Stanchich never moved to have the jury instructed not to consider the Fitzgerald statements against Stanchich, and accordingly he waived this issue on appeal. This omission is perhaps best explained by the fact that Fitzgerald's statements, insofar as they concerned Stanchich, were not damaging to Stanchich, as he appears to concede. (Br. at 27).

A. The Statements by Fitzgerald About Which Stanchich Complains Were Not Hearsay and Were Not Damaging

Stanchich points to three statements by Fitzgerald which he claims were hearsay as to him.* Stanchich complains first of Fitzgerald's reference to him in a phone conversation with Lurie on October 28, 1975; secondly, of Fitzgerald's repeated references to "his people" during his negotiations with the agent, McDonnell; and, thirdly, of Fitzgerald's conversation with McDonnell in the Blarney Stone Bar on November 12, 1976, in which McDonnell asked whether Stanchich was Fitzgerald's cohort. None of these statements were hearsay or damaging as to Stanchich.

1. The October 28, 1975 phone conversation

In the October 28, 1975 phone conversation, Lurie first advised the defendant Fitzgerald that he had a buyer for

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* In setting forth these three statements, Stanchich argues that they are merely examples of a "welter" of hearsay statements by Fitzgerald. We are unable to discern what this "welter" may be, but we are confident that, if there were additional "hearsay" statements, the analysis that follows would dispose of them.

counterfeit treasury bills. When Lurie asked Fitzgerald if Stanchich was available, Fitzgerald simply replied that he was in Europe, but would return shortly.* No damage to Stanchich resulted from this conversation.

First, unmentioned in Stanchich's brief is the fact that the Court received this conversation *only as to Fitzgerald.* (Tr. 40). It was never offered or received against Stanchich. Secondly, the only assertions in the conversation by Fitzgerald which could arguably have affected Stanchich were that Fitzgerald seemed to know Stanchich and that Stanchich was in Europe. The first assertion was repeatedly established by other testimony and depended not on the "truth" of any assertion by Fitzgerald, but rather simply on the fact that, when Stanchich was mentioned, Fitzgerald was prepared to provide information about him; the second assertion was stipulated to by the defense. (Tr. 311). Accordingly, these statements were not hearsay. See *United States* v. *Frank*, 494 F.2d 145, 155 (2d Cir.), *cert. denied*, 419 U.S. 828 (1974); Fed. R. Evid. 801(c). Thirdly, Stanchich chooses to ignore that, when Fitzgerald next spoke to Lurie on November 3, 1975, Fitzgerald advised Lurie that he had contacted "his people" and Stanchich was not among the group contacted. (Tr. 50). In short, as Judge Pierce ruled, Fitzgerald's conversation of October 28, 1975 was totally innocuous as far as Stanchich was concerned. (Tr. 35-36).

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* Although defense counsel had been given a copy of the tape and transcript of this conversation well before trial, he only moved to redact the tape to remove references to Stanchich for the first time as the transcript and tape were being offered. (Tr. 33-34). The belated nature of this motion to redact would have been sufficient in itself to justify the court's refusal to consider it. See *United States* v. *Chiarizio*, 525 F.2d 289, 293-94 (2d Cir. 1975).

2. Fitzgerald's references to "his people"

Stanchich correctly observes (Br. 18) that Fitzgerald made repeated references to "his people" during the course of his negotiations (*e.g.*, Tr. 49-50, 53, 54, 138, 139). What he omits to acknowledge, however, is that no objection was made by Stanchich to the receipt in evidence against him of the majority of Fitzgerald's references to "his people", nor was any request for a limiting instruction made. Accordingly, Stanchich waived any right to raise this issue on appeal. See *United States* v. *Domenech*, 476 F.2d 1229, 1232 (2d Cir. 1973); *Messina* v. *United States*, 388 F.2d 393, 395 (2d Cir.), *cert. denied*, 390 U.S. 1026 (1968); *United States* v. *Indiviglio*, 352 F.2d 276, 279-80 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966).

That no objection was made to the receipt of much of this evidence is not really surprising, since it was not damaging to Stanchich. The quoted words do not name Stanchich or implicate him in any way. Moreover, defense counsel doubtless recognized that there was little point in objecting to Fitzgerald's statement that he was working together with other people, since Fitzgerald's repeated meetings, often with Stanchich nearby, and inability to arrive at an agreement with McDonnell as to how to proceed with the sale clearly disclosed that there were others who had to be consulted. The key issue was whether Stanchich was one of those others, and the statements about Fitzgerald's "people" shed no light on that issue. Indeed, Stanchich concedes as much when he points out in his brief that Fitzgerald's references to "his people" do "not establish Stanchich's guilt," since they do not disclose that Stanchich "was one of Fitzgerald's people." (Br. 27).

But even assuming that proper hearsay objections had been made to this evidence, Judge Pierce could have properly rejected them, since Fitzgerald's references to "his people" were not hearsay, but rather verbal acts which lent significance to and shed light on otherwise ambiguous acts which constituted direct evidence of the scheme. See *United States* v. *Wiley*, 519 F.2d 1348, 1350 (2d Cir. 1975); *United States* v. *D'Amato*, 493 F.2d 359, 363-64 (2d Cir. 1974); *United States* v. *Glasser*, 443 F.2d 994, 999 (2d Cir.), *cert. denied*, 404 U.S. 854 (1971); *United States* v. *Nuccio*, 373 F.2d 168 (2d Cir.), *cert. denied*, 387 U.S. 906 (1967); *United States* v. *Annunziato*, 293 F.2d 373, 377 (2d Cir.), *cert. denied*, 368 U.S. 919 (1961). For example, Fitzgerald's statement at the November 10, 1975 evening restaurant meeting with McDonnell that he would return to "his people" to ask whether they would agree to McDonnell's suggestion to complete the whole sale at one time and would call McDonnell at 9:15 a.m. on November 12, 1975 (Tr. 143-44), lent a good deal of significance (1) to Stanchich's actions of following McDonnell down the street as McDonnell left the restaurant on November 12th and (2) to Fitzgerald's meeting with Stanchich just before the phone call was made by Fitzgerald to McDonnell on the morning of November 12, 1975. See *United States* v. *Annunziato*, *supra*, 293 F.2d at 376-78. Similarly, Fitzgerald's statement of his intention to try to have "his people" agree to McDonnell's terms on November 12, 1975, again shed light on the conversations between Fitzgerald and Stanchich shortly thereafter. See pp. 10-11, *supra*. See *United States* v. *D'Amato*, *supra*, 493 F.2d

at 363-65*; *United States* v. *Annunziato, supra,* 293 F.2d at 377-78.**

3. The November 12, 1975 statements

In the Blarney Stone Bar, in the afternoon of November 12, 1975, McDonnell told Fitzgerald he had seen Stanchich at the Compass Restaurant earlier that morning and asked what Stanchich was doing there. Fitzgerald replied that McDonnell should not ask questions about his end of the deal. When McDonnell added that he did not like people knowing who he was, Fitzgerald said he would "get rid of him. . . ." McDonnell then asked about the man with Stanchich (Napoli), and Fitzgerald said that he would get rid of them both. When McDonnell then offered to meet with the two men, Fitzgerald replied that he could not bring the men into the bar. (Tr. 153-54). This evidence was received subject to connection. (Tr. 153).

This evidence was not directly inculpatory of Stanchich. Fitzgerald never acknowledged Stanchich's in-

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* It is true that, in the course of finding the *Geaney* rule satisfied in *United States* v. *D'Amato, supra,* at 364-65, there was dicta to the effect that the statement of a defendant that he was going to meet with "his people" at 9 o'clock was hearsay as to the co-defendants he met at 9 o'clock. However, this brief passage in *D'Amato* appears to conflict with this Court's decisions in *United States* v. *Ragland,* 375 F.2d 471, 478 (2d Cir. 1967), *cert. denied,* 390 U.S. 925 (1968), and *United States* v. *Annunziato, supra,* 293 F.2d at 376-78 and the Supreme Court's decision in *Mutual Life Ins. Co.* v. *Hillman,* 145 U.S. 285, 295 (1892). See also *United States* v. *Lubrano,* 529 F.2d 633, 636-37 (2d Cir. 1975).

** Indeed, insofar as these assertions of Fitzgerald were statements of his present intent to speak with "his people", they also fell within an exception to the hearsay rule. See Fed. R. Evid. 803(3).

volvement; he merely said he would get rid of him. As Stanchich himself recognizes, Fitzgerald's statement at the bar "that he would 'get rid of' Stanchich cannot prove appellant's association with Fitzgerald with knowledge of Fitzgerald's activity." (Br. 27).

In addition, this testimony was not hearsay. It was not offered for "the truth of the matter asserted," * *i.e.*, that Fitzgerald would get rid of Stanchich, ** but rather as circumstantial evidence of Fitzgerald's control over Stanchich. And to the extent that this assertion might be viewed as hearsay, it was surely a statement of Fitzgerald's present intent, explicitly excepted from the hearsay rule. Fed. R. Evid. 803(3).

B. If Any of Fitzgerald's Statements Were Hearsay, They Were Admissible in Any Event, Since Judge Pierce Correctly Found An Agency Relationship Between Stanchich and Fitzgerald.

At the conclusion of the Government's case, Stanchich moved for a judgment of acquittal. (Tr. 316). The Court then requested the prosecutor to outline the non-hearsay evidence demonstrating Stanchich's involvement in the counterfeit scheme. (Tr. 318). Shortly after the prosecutor began, the trial judge interrupted to express his view that there was sufficient evidence on the substantive counts, but that he was troubled by the sufficiency of the evidence demonstrating that Stanchich had entered into an unlawful conspiratorial agreement with Fitzgerald. (Tr. 331-32).

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* Fed. R. Evid. 801(c).

** Indeed, since Fitzgerald was arrested moments later, he never had an opportunity to ask Stanchich to leave the area.

Judge Pierce then inquired of the prosecutor why it was necessary to have a conspiracy count in the indictment at all. When the prosecutor's reply indicated that the Count was probably unnecessary, Judge Pierce promptly dismissed it. (Tr. 332-33).

Although Judge Pierce then somewhat ambiguously suggested that his dismissal of Count One might have been because of an inadequate *Geaney* showing (Tr. 334), he went on to say that, with respect to the substantive counts, the Government had clearly proven by a fair preponderance of the non-hearsay evidence Stanchich's involvement with Fitzgerald in a scheme to sell counterfeit bills. (Tr. 342).

Judge Pierce correctly recognized that the dismissal of the conspiracy count did not preclude the jury's consideration of Fitzgerald's statements against Stanchich. See *United States* v. *Zane*, 495 F.2d 683, 692 (2d Cir.), *cert. denied*, 419 U.S. 895 (1974). The statements were fully admissible against Stanchich once it was established by a fair preponderance of the non-hearsay evidence that the two men were acting in an agency relationship. See Fed. R. Evid. 801(d)(2)(D); *United States* v. *Olweiss*, 138 F.2d 798, 800 (2d Cir. 1943), *cert. denied*, 321 U.S. 744 (1944). See also *United States* v. *Ruggiero*, 472 F.2d 599, 607 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); *United States* v. *Branker*, 418 F.2d 378, 380 (2d Cir. 1969); *United States* v. *Annunziato*, 293 F.2d 373, 378 (2d Cir. 1961).

In making his preliminary finding of admissibility, Judge Pierce exercised a wide discretion accorded District Judges, which is rarely disturbed on appeal. See *United States* v. *Ragland*, 375 F.2d 471, 477 (2d Cir. 1967), *cert. denied*, 390 U.S. 925 (1968); *United States*

v. *Von Clemm*, 136 F.2d 968, 971 (2d Cir.), *cert. denied*, 320 U.S. 769 (1943).* Here, it is clear that Judge Pierce did not abuse his broad discretion.

The non-hearsay evidence of Stanchich's knowing participation with Fitzgerald in a scheme to sell counterfeit treasury bills included, first, the fact that in August 1974 Stanchich had offered to sell counterfeit treasury bills to Lurie, and, second, in April 1975 Stanchich had told Lurie that he was aware of an attempt by Robert Della Porta to trick Lurie into purchasing counterfeit treasury bills. Proof of these similar acts was, of course, offered both to show that Stanchich's later participation in the October and November 1975 events was part of a common scheme and to establish Stanchich's guilty knowledge and intent with respect to these later events. Fed. R. Evid. 404(b); see *United States* v. *Natale*, 526 F.2d 160 (2d Cir. 1975); *United States* v. *Leonard*, 524 F.2d 1076, 1091 (2d Cir. 1975), *cert. denied*, — U.S. — (1976); *United States* v. *Campanile*, 516 F.2d 288, 292 (2d Cir. 1975); *United States* v. *Drummond*, 511 F.2d 1049, 1055 (2d Cir.), *cert. denied*, 423 U.S. 844 (1975); *United States* v. *Kaufman*, 453 F.2d 306, 310 (2d Cir. 1971).

Coupled with this similar act testimony was the fact that, although Lurie contacted Fitzgerald by phone on October 28, 1975, the initial meeting between Fitzgerald and Lurie at which Fitzgerald supplied the sample counterfeit treasury bill did not occur until November 4, 1975, four days after Stanchich had returned from

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* The proof needed to satisfy the fair preponderance test is less than required to justify submitting the charge to the jury, *United States* v. *Calabro*, 449 F.2d 885, 890 (2d Cir. 1971), *cert. denied*, 405 U.S. 928 (1972), and it is well-settled that the non-hearsay evidence may be wholly circumstantial, *United States* v. *Manfredi*, 488 F.2d 588, 596-97 (2d Cir. 1973); *United States* v. *Ragland*, *supra*, 375 F.2d at 477.

Europe to the United States. In light of the preceding and subsequent events, it was reasonable for Judge Pierce to conclude that Fitzgerald was delayed in obtaining the sample because Stanchich's friend Della Porta was the principal source of the counterfeit bills and Stanchich was not available to contact Della Porta until after his return from Europe on October 30, 1975.

More dramatic proof of Stanchich's behind the scenes participation in this scheme to sell counterfeit bills came on the night of November 10, 1975. That night Agent McDonnell, posing as a corrupt banker, met with Fitzgerald in a midtown restaurant. After negotiating the manner in which the $3 million sale would be carried out, McDonnell left the restaurant and started walking down 45th Street, which was virtually deserted. Close on McDonnell's heels was Stanchich who broke off his surveillance only when Agent McDonnell used evasive tactics in the vicinity of Grand Central Station. Judge Pierce was entitled to infer that the purpose of Stanchich's conduct in following McDonnell at that time of night was to assure himself that McDonnell was a commuting banker with whom it was safe to do business, not a law enforcement agent. *United States* v. *Calabro*, 449 F.2d 885, 890 (2d Cir. 1971), *cert. denied*, 405 U.S. 928 (1972).

Equally probative of Stanchich's participation in this illegal scheme was his conduct on November 12, 1975. Just before Agent McDonnell left the restaurant on November 10, 1975, he had agreed with Fitzgerald that Fitzgerald would call him at 9:15 a.m. on November 12, 1975 to let him know whether Fitzgerald's cohorts agreed to complete the deal in the manner McDonnell had suggested. At 8:45 a.m. on November 12, 1975, just one half hour before Fitzgerald was scheduled to call McDonnell with a decision, Stanchich and Fitzgerald met in a

midtown diner and spoke for a half hour. After this meeting with Stanchich was over, Fitzgerald promptly phoned Agent McDonnell to arrange a meeting for that morning, while Stanchich entered his automobile. Upon completion of his phone call with McDonnell, Fitzgerald entered Stanchich's car, and Stanchich drove Fitzgerald to the meeting place, a restaurant in lower Manhattan. Stanchich then sat in a nearby booth, while Fitzgerald negotiated with Agent McDonnell.

Stanchich's half hour discussion with Fitzgerald just prior to the scheduled phone call to McDonnell is strong circumstantial evidence of his involvement in the scheme. While an innocent explanation can be offered for Stanchich's early morning meeting with Fitzgerald in a diner, the fact that the discussions immediately preceded an important phone call to McDonnell and then Stanchich drove Fitzgerald to the downtown meeting with McDonnell and sat just two booths away demonstrates that Stanchich had much more than a passing interest in the movements of his colleague, Fitzgerald.

Any lingering doubts concerning Stanchich's criminal involvement were surely dissipated by the events following the restaurant meeting. As McDonnell left the restaurant, after again having urged Fitzgerald to approach his cohorts and convince them to complete the entire transaction at one time, Stanchich followed close behind. Plainly, Stanchich had a vested interest in this illegal deed and was once again following McDonnell to check out his story that he was a downtown banker. See *United States* v. *Calabro, supra.*

Shortly thereafter, Stanchich and Fitzgerald were observed in a nearby lobby having a heated discussion. Minutes later, Fitzgerald again phoned McDonnell to arrange another meeting for two hours later. The fact

that Fitzgerald's two phone calls to McDonnell on November 12, 1975 followed on the heels of discussions with Stanchich was itself highly probative. See *United States* v. *Ragland, supra,* 375 F.2d at 478. That Stanchich's conversations with Fitzgerald might have involved matters other than the transfer of counterfeit treasury bills is, of course, "possible," but as Judge Learned Hand observed: "All things are possible, but not all are probable." *United States* v. *Arrow Packing Corp.*, 135 F.2d 669, 670 (2d Cir.), *cert. denied*, 327 U.S. 805 (1946).

After Fitzgerald had made his final call to Agent McDonnell at noon, Stanchich was observed walking in the Wall Street area with Fitzgerald nearby. Approximately one half hour before Fitzgerald was to go to the bar to meet with McDonnell, Stanchich went to the entrance of the garage where he had parked his car, looked up and down the street and entered the garage. At approximately 2:00 p.m., while Fitzgerald was meeting with McDonnell, Stanchich drove the car out of the garage, began circling the area, and was arrested.

Stanchich's conduct in killing time in the Wall Street area before Fitzgerald's critical meeting and then "squaring" blocks in Manhattan during the meeting certainly permitted, if it did not compel, the inference that Stanchich was patiently awaiting Fitzgerald's completion of the deal with McDonnell and was then planning to make a quick getaway with Fitzgerald and the $25,000 proceeds of the sale of the first counterfeit treasury bill. *Cf. United States* v. *D'Amato, supra,* 493 F.2d at 365.

When the similar act testimony demonstrating knowledge and common scheme is coupled with Stanchich's attempts to assure himself of the Agent's trustworthiness, with Stanchich's meetings with Fitzgerald just before im-

portant phone calls to McDonnell and with Stanchich's use of the car to provide needed transportation, far more is proved than the "mere association" claimed by Stanchich. (Br. 20). While Stanchich's guile led him to maintain a low profile in this scheme, the non-hearsay evidence when "viewed not in isolation but in conjunction," *United States* v. *Geaney*, *supra*, 417 F.2d at 1121, as it must be,* demonstrated by far more than a mere preponderance of the evidence that Stanchich was a co-schemer with Fitzgerald. To argue, as Stanchich desperately does, that there was no evidence of Stanchich's knowledge of the illegal scheme nor that he intended to participate in it (Br. 20), is simply to ignore (1) that the trial judge has a right and duty to draw justifiable inferences of fact, see *United States* v. *Taylor*, 464 F.2d 240, 243 (2d Cir. 1972); *United States* v. *Calabro*, *supra*, 449 F.2d at 890,** and (2) that evidence of guilty knowledge, viewed as a whole, acquires a significance beyond that of its component parts. See *United States* v. *Bottone*, 365 F.2d 389, 392 (2d Cir.), *cert. denied*, 385 U.S. 974 (1966); *United States* v. *White*, 124 F.2d 181, 185 (2d Cir. 1941). Clearly, Judge Pierce did not abuse his discretion in finding that the Government had proven Stanchich's un-

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* See also *United States* v. *Cassino*, 467 F.2d 610, 618 n.21 (2d Cir. 1972); *United States* v. *Monica*, 295 F.2d 400, 401 (2d Cir. 1961), *cert. denied*, 368 U.S. 953 (1962).

** There is no requirement that the inferences relied upon by the Government be compelled by the evidence or that the evidence foreclose all inferences supporting innocence. *Holland* v. *United States*, 348 U.S. 121, 139-140 (1954); *United States* v. *Bohle*, 475 F.2d 872, 875 (2d Cir. 1973); *United States* v. *Taylor*, *supra*, at 244; *United States* v. *Grunberger*, 431 F.2d 1062, 1066 (2d Cir. 1970). *See also United States* v. *Pfingst*, 477 F.2d 177, 197 (2d Cir.), *cert. denied*, 412 U.S. 941 (1973). As this Court recently reaffirmed, "The prosecution . . . is under no duty to negate all possible innocent inferences from a set of circumstantial facts. . . ." *United States* v. *Singleton*, 532 F.2d 199, 203 (2d Cir. 1976).

lawful and knowing participation in this scheme by a fair preponderance of the non-hearsay evidence.*

C. In Any Event, No Proper Objection Was Taken To The Judge's Ruling or His Charge

As previously discussed, of the three statements which Stanchich claims were improperly admitted in evidence against him, one was never offered or received against him (the October 28, 1975 phone conversation) and another (the references by Fitzgerald to "his people") did not lead to defense objections on the majority of occasions in which the statement was made. In addition to these procedural obstacles to Stanchich's claims, there are others.

Foremost is the fact that when Judge Pierce ruled that the Government had proved Stanchich's connection to the scheme, the judge permitted the introduction of certain physical evidence against Stanchich but he did not specifically address the admissibility of any of Fitzgerald's statements. Thus, Judge Pierce ruled only on the admissibility of two counterfeit treasury bills which had earlier been received subject to connection (GX 4 and 5) (see Tr. 333-34, 338-39, 342-43), and instructed the jury that they were now to be considered against Stanchich.

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* Stanchich's reliance on the Fifth Circuit's decision in *United States* v. *Oliva*, 497 F.2d 130 (5th Cir. 1974) is surprising. First, Stanchich ignores that in *Oliva* the Fifth Circuit explicitly adopted a test for the admissibility of hearsay evidence which is considerably more strict than that followed in this Circuit. 497 F.2d at 132-33 & n.3. Secondly, Stanchich overlooks that while Oliva was merely present at the scene of the crime in a car, Stanchich had been shown to have had an active role in this venture when he shadowed Agent McDonnell and provided transportation for Fitzgerald. Stanchich also conveniently ignores the absence of similar act testimony in *Oliva*.

(Tr. 342-44). Thereafter, without having raised the question of the admissibility of Fitzgerald's statements, Stanchich and Fitzgerald rested without presenting any evidence in their own behalf. (Tr. 344-45). At no time did Stanchich make any request that the jury be instructed in any way as to the use of Fitzgerald's statements against Stanchich.*

After summations by counsel, Judge Pierce charged the jury. During his charge, the only reference made by Judge Pierce to evidence received subject to connection was the following:

> "As I told you earlier in the trial certain evidence was being received subject to connection. I have already instructed you that I have found this evidence to be connected, and thus that it may be considered by you along with all other evidence in the case." (Tr. 388-89).

Either Judge Pierce thereby ruled that Fitzgerald's statements were admissible against Stanchich or the Judge erred in failing to instruct the jury as to those statements. Whichever alternative is correct, Stanchich had an opportunity to voice his objections at the conclusion of the charge, but when asked to do so, he simply stated, "Your Honor, I have no exceptions whatsoever." (Tr. 420-21).

Since Stanchich never requested an appropriate instruction from the trial court and affirmatively stated that he had no objection to the Court's charge to the jury, he waived any claim of error on this issue. See Fed. R. Crim. P. 30, 52(b); *United States* v. *Pelose*, 538 F.2d 41,

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* Stanchich submitted four written requests to charge to the trial court. None of these requests were directed to the use of Fitzgerald's statements. Judge Pierce granted Stanchich's written requests. (Tr. 347).

43 (2d Cir. 1976); *United States* v. *Santiago*, 528 F.2d 1130, 1135 (2d Cir.), *cert. denied*, 44 U.S.L.W. 3659 (May 19, 1976); *United States* v. *Goldberg*, 527 F.2d 165, 173 (2d Cir. 1975); *United States* v. *Dozier*, 522 F.2d 224, 228 (2d Cir. 1975), *cert. denied*, 423 U.S. 1021 (1976).*

Finally, it is important to note that, even assuming *arguendo* that Stanchich's agency relationship was not established by a fair preponderance of the evidence and that Stanchich had timely requested an instruction that Fitzgerald's statements could not be considered against him, the trial judge would properly have refused to deliver it. To convict for aiding and abetting, the Government bears the burden of proving the guilt of the aider and abettor's principal. *United States* v. *Deutsch*, 451 F.2d 98, 118-19 (2d Cir. 1971), *cert. denied*, 404 U.S. 1019 (1972). Proof of the guilt of the principal is therefore necessarily admissible against the aider and abettor and that proof may be comprised of any evidence which would have been admissible in the principal's prosecution. See *United States* v. *Deutsch*, *supra*, 451 F.2d at 116; *Roth* v. *United States*, 339 F.2d 863, 865 (10th Cir. 1964); *United States* v. *Dowery*, 334 F.2d 787, 788 (7th Cir.), *cert. denied*, 397 U.S. 933 (1964); *Ward* v. *United States*, 296 F.2d 898, 902-03 (5th Cir. 1961); *Colosacco* v *United States*, 196 F.2d 165, 167 (10th Cir. 1952). Accordingly, any request that the trial court direct the jury to disregard Fitzgerald's statements in evaluating the guilt of Stanchich on the substantive allegations would have been

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* No plain error occurred here. We have previously discussed our view that none of the statements claimed to be hearsay were damaging to Stanchich, and to the extent they were inculpatory, they were merely cumulative. See, *e.g.*, *United States* v. *Williams*, 523 F.2d 407, 410 (2d Cir. 1975); *United States* v. *Cirillo*, 499 F.2d 872, 889 (2d Cir.), *cert. denied*, 419 U.S. 1056 (1974).

an incorrect and overly broad statement of the law, and such request would have been properly rejected by Judge Pierce. *United States* v. *Leonard*, 524 F.2d 1076, 1084 (2d Cir. 1975), *cert. denied* — U.S. — (1976).

POINT II

The Evidence of Stanchich's Guilty Participation In The Substantive Violations Was More Than Sufficient.

Stanchich also claims that the evidence was insufficient to establish beyond a reasonable doubt his participation in the venture and his guilty knowledge. These contentions are unsupported by the evidence when viewed, as it must be once a jury has found guilty beyond a reasonable doubt, in the light most favorable to the Government. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *United States* v. *Arroyo*, 494 F.2d 1316, 1317 (2d Cir.), *cert. denied*, 419 U.S. 827 (1974); *United States* v. *Ross*, 464 F.2d 376, 378 (2d Cir. 1972), *cert. denied*, 410 U.S. 990 (1973).

To support his claim of insufficiency, Stanchich offers a recitation of legal principles, with which the Government does not disagree, together with a totally inadequate review of the evidence and the legitimate inferences to be drawn therefrom. Simply put, we agree that proof of a defendant's mere presence at the scene of the crime would be inadequate to prove his guilt, even if that presence were accompanied by knowledge of the offense. See *United States* v. *Garguilo*, 310 F.2d 249, 253-54 (2d Cir. 1962). What the evidence showed here, however, was that Stanchich "knew about the enterprise and intended to participate in it or make it succeed." *United States* v. *Cirillo*, 499 F.2d 872, 883 (2d Cir.), *cert. denied*, 419 U.S. 1056 (1974).

Before turning to a review of the evidence, it is important to note that no objection has been made to the charge delivered to the jury in this case. See *Nye & Nissen* v. *United States*, 336 U.S. 613, 619 (1949). Judge Pierce carefully instructed the jurors on the law of aiding and abetting and specifically advised them that proof of Stanchich's presence even coupled with proof of his knowledge of the crime would not be sufficient to convict:

> "In order to aid or abet another to commit a crime in this case it is necessary that the accused person wilfully and knowingly associate himself in some way with the crime charged and that he wilfully and knowingly seek by some act to help make the crime successful.
>
> I already explained to you the meaning of the words wilfully and knowingly. *The mere presence of a defendant where a crime is being committed, even coupled with knowledge by the defendant that a crime is being committed, or the mere negative acquiescence by a defendant in the criminal conduct of others, even with guilty knowledge, is not sufficient to establish aiding and abetting. An aider and abettor must have some interest in the criminal venture.*
>
> To determine whether a defendant aided or abetted the commission of the offenses with which he is charged in the indictment ask yourselves these questions. Did he participate in the crime charged as something he wished to bring about?
>
> Did he associate himself with the criminal venture knowingly and wilfully?
>
> Did he seek by his action to make the criminal venture succeed?
>
> If he did, then he is an aider and abettor and therefore guilty of the offense you have found to

> have been committed. If he didn't, then he is not an aider and abettor and is not guilty of the offense." (Tr. 415-17) (emphasis supplied).

See *United States* v. *Terrell*, 474 F.2d 872 (2d Cir. 1973); *United States* v. *Garguilo*, *supra*, 310 F.2d at 254.

Even a cursory review of the proof convincingly demonstrates that there was sufficient evidence from which this properly instructed jury could infer that Stanchich associated himself with the venture and sought to make it succeed.* See *United States* v. *Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) (L. Hand, J.). Stanchich's behind the scenes presence and his attempts to trail McDonnell as he left his meetings with Fitzgerald on November 10 and 12, 1975 were certainly adequate to supply the necessary evidence of participation. See *United States* v. *Garguilo*, *supra*, 310 F.2d at 253. Similarly, Stanchich's use of his car to drive Fitzgerald to his meetings with McDonnell and his apparent readiness to circle the area and pick up Fitzgerald together with the proceeds of the illegal sale on the day of his arrest are further proof of participation. *Cf. United States* v. *D'Amato*, *supra*, 495 F.2d at 364-65; *United States* v. *Barrera*, 486 F.2d 333, 335-37 (2d Cir. 1973); *United States* v. *Garguilo*, *supra*, 310 F.2d at 253; *United States* v. *Simon*, 78 F.2d 454, 455-56 (6th Cir. 1935). While the evidence of participation was concededly circumstantial, this in no sense rendered it inadequate. See *Nye & Nissen* v. *United States*, *supra*, 336 U.S. at 619; *United States* v. *Lefkowitz*, 284 F.2d 310, 315-16 (2d Cir. 1960).

The evidence of Stanchich's knowledge, although circumstantial, was equally compelling. Supporting the

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* We have not attempted to recite the evidence in as much detail as Point I, *supra*. A familiarity with the argument in that portion of the brief is assumed.

jury's finding that Stanchich's participation was knowing was first the fact that Stanchich had earlier offered to sell Lurie counterfeit treasury bills and had admitted his awareness of a later attempt by Della Porta to trick Lurie into purchasing counterfeit treasury bills. Also probative of Stanchich's knowledge was the fact that when Lurie initially phoned Fitzgerald on October 28, 1975, Lurie expressed interest in the very counterfeit bills that Stanchich's friend Della Porta had previously offered to sell to Lurie. Since Fitzgerald did not provide Lurie with a sample bill until after Stanchich returned to the United States from Europe, it was reasonable for the jury to conclude that Stanchich obtained the sample bill from his friend, Della Porta. Moreover, since it was stipulated that the sample treasury bills turned over to McDonnell by Fitzgerald on November 4 and 12, 1975 were both manufactured by copying the same pattern bill, see p. 12, *supra*, the jury could properly have inferred that Stanchich was responsible for obtaining both counterfeit bills.

Stanchich's knowing participation was also proved by his conduct. Stanchich's studious attempts to remain in the background and avoid meeting McDonnell certainly tended to prove that Stanchich was aware that there was reason to fear unnecessary exposure to third parties. That Stanchich knew Fitzgerald's dealings with McDonnell were illegal was confirmed when Stanchich twice followed McDonnell as he left meetings with Fitzgerald. Further proof of Stanchich's knowing participation came on the two occasions Stanchich spoke with Fitzgerald just before Fitzgerald called McDonnell to set up important meetings.

While these facts were sufficient for the jury to conclude guilt beyond a reasonable doubt, it also is sig-

nificant that Stanchich chose to offer no defense. As Judge Friendly observed in *United States* v. *Frank*, 494 F.2d 145, 153 (2d Cir.), *cert. denied*, 419 U.S. 828 (1974):

> "[T]he self-incrimination clause does not elevate a defendant's silence, much less the failure to present any defense case, to the level of a convincing refutation. When a defendant has offered no case, it may be reasonable for a jury to draw inferences from the prosecution's evidence which would be impermissible if the defendant had supplied a credible exculpatory version."

See also *United States* v. *Parness*, 503 F.2d 430, 437 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975). Here, where there was no exculpatory version offered by the defendant, the jury was entitled to draw inferences of knowledge and purposeful action from Stanchich's highly suspicious activities with Fitzgerald.

In cases such as this, where a defendant has remained in the background and therefore proof of guilt must necessarily be circumstantial, this Court has recognized that each case is *sui generis*. *United States* v. *Lubrano*, 529 F.2d 633, 637 (2d Cir. 1975). Thus, while Stanchich seeks to gain support from cases such as *United States* v. *Infanti*, 474 F.2d 522 (2d Cir. 1973),* he plainly ignores cases such as *United States* v. *Rizzuto*, 504 F.2d 419 (2d Cir. 1974); *United States* v. *D'Amato*, *supra*, 493 F.2d at 364-65; and *United States* v. *Barrera*, 486 F.2d 333 (2d Cir. 1973), in which this Court sustained, after an attack for insufficiency, convictions based on evidence less compelling than that in this case.

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* *Infanti* is, in any event, readily distinguishable from this case. There, no similar act proof was offered. In addition, the Court there noted that there was considerable evidence consistent with the defendant's innocence. 474 F.2d at 526. In the instant case, none of Stanchich's activities had the color of innocence.

In sum, there was more than sufficient evidence for the jury to conclude that Stanchich was a knowing participant whose function in this illegal scheme was that of the supplier of counterfeit treasury bills to a middleman. Stanchich's arguments to the contrary fail to give "full play to right of the jury to determine credibility, weigh the evidence and draw justifiable inferences of fact." *United States* v. *Harris*, 435 F.2d 74, 88 (D.C. Cir. 1970), *cert. denied*, 402 U.S. 986 (1971); *Curley* v. *United States*, 160 F.2d 229, 232 (D.C. Cir), *cert. denied*, 331 U.S. 837 (1947).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

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) ss.:
COUNTY OF NEW YORK)

STEVEN FRANKEL, being duly sworn, deposes and says that he is employed in the office of the Strike Force for the Southern District of New York.

That on the 24th day of November, 1976, he served two copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

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Steven K. Frankel

Sworn to before me this

24th day of November, 1976

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